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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 111

H. J. HARRIS, GEORGE W. HARTMAN, OLEN B. HINER, ET AL.,

Appellants,

vs.

JOHN S. BATTLE, GOVERNOR OF THE COMMONWEALTH OF VIRGINIA, ET AL.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

STATEMENT AS TO JURISDICTION

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I. J. GROMFINE,
JUSTUS R. MOLL,
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Springfield, No. 1939 11410

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IN THE SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND

H. J. HARRIS, GEORGE W. HARTMAN, OLEN B. HINER, P. M. BROOKS, AND DIVISION NO. 1079, AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYES OF AMERICA, A. F. L.,

Appellants,

vs.

JOHN S. BATTLE, GOVERNOR OF THE COMMONWEALTH OF VIRGINIA; H. LESTER HOOKER, CHAIRMAN AND W. MARSHALL KING AND RALPH T. CATTERALL, MEMBERS, STATE CORPORATION COMMISSION AND WILLIAM C. SEIBERT, AGENT IN CHARGE

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, Appellants herein submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order and judgment of the Supreme Court of Appeals of Virginia entered in this cause.

Opinion Below

The final order and judgment of the Supreme Court of Appeals of Virginia involved in this appeal is unreported. It is attached hereto as Appendix "*A*". That judgment

states that its effect "is to affirm the decree" of the Circuit Court of the City of Richmond. The latter decree is likewise unreported and is attached hereto as Appendix "*B*".

Jurisdiction

The final order of the Supreme Court of Appeals of Virginia was entered on January 27, 1954. A petition for appeal is presented to the Supreme Court of Appeals of Virginia herewith, to wit, on April 20, 1954. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, United States Code, Section 1257(2) in that there is drawn in question the validity of a state statute on the ground of its being repugnant to the laws and the Constitution of the United States and the decision by the state court is in favor of the validity of said state statute.

This is a suit to enjoin the enforcement of a state statute providing for the seizure of certain types of business operations where a work stoppage is threatened. In their Bill in Equity filed in the Circuit Court of the City of Richmond Appellants alleged that the powers vested in the Governor of Virginia under the terms of the statute in question are "repugnant to and in conflict with the provisions of the Labor Management Relations Act, 1947, as amended, and are contrary to the provisions of Article I, Section 8, Article VI, and the Fourteenth Amendment of the Constitution of the United States." Appellants' Bill further alleged that the powers vested in the Governor under the terms of the statute in question "constitute a continuing impairment of constitutional rights not only in the present dispute but in all future collective bargaining affecting the [Appellants] and all others similarly situated," in that "as long as the Governor . . . is free to exercise the authority and to enforce the prohibitions provided for . . . at this time or

at any time in the future . . . there is a continuing interference with and impediment to collective bargaining as provided for and required by the Labor Management Relations Act, 1947." Consistent therewith, the Appellants prayed, *inter alia*, for a permanent injunction directing the Appellees "to cease giving effect at any time to any of the provisions of [the statute in question]."

While the suit was before the Circuit Court of the City of Richmond the Appellees moved to dismiss the Bill on the ground that the case no longer presented a justiciable controversy. The said Circuit Court overruled this motion, but denied the Appellants' prayer for a permanent injunction on the ground, as stated in the Court's decree, that the state law in question "is not in conflict with the laws of the United States and is not repugnant to the Constitution of the United States . . . and is valid."

The Appellants filed a timely notice of appeal to the Supreme Court of Appeals of Virginia, assigning as error *inter alia*, that the Circuit Court "erred in holding that Chapter 696, Acts of Assembly 1952, is not in conflict with the laws of the United States, and is not repugnant to the Constitution of the United States."

Although the Appellees noted no exception to the order of the Circuit Court overruling the motion to dismiss on grounds of mootness, and although the circumstances bearing upon the question of mootness were, at the time the case was before the Supreme Court of Appeals, precisely as they were at the time the case was before the Circuit Court, the Supreme Court of Appeals rejected the appeal stating that "there no longer exists a justiciable controversy." That Court further stated, however, that "the effect" of its action "is to affirm the decree of said circuit court."

In that posture, the Appellants believe and submit that the decision herein appealed from "is in favor of the

validity" of the state statute, and therefore, that the jurisdiction of the Supreme Court of the United States is expressly conferred by Title 28, United States Code, Section 1257(2). *Cf. Largent* v. *Texas*, 318 U. S. 418; *American Railway Express Co.* v. *Levee*, 263 U. S. 19; *Western Union Telegraph Co.* v. *Crovo*, 220 U. S. 364; *Norfolk, etc., Turnpike Co.* v. *Virginia*, 225 U. S. 264.

If, however, the order of the Supreme Court of Appeals of Virginia rejecting the Appellants' appeal be viewed as having disposed of the case on grounds of mootness then the Appellants believe and respectfully submit that, for the reasons stated below, this non-federal ground is wholly untenable, and "so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question." *Enterprise Irrigation District* v. *Farmers' Mut. Canal Co.*, 243 U. S. 157, 164. Such a ground cannot avoid review by the United States Supreme Court on the question of the validity of the state statute on the ground of repugnancy to federal law and to rights under the laws and Constitution of the United States, which question was raised by the Appellants from the inception of this suit. *Love, et al.* v. *Griffith, et al.*, 266 U. S. 32; *Ancient Egyptian Arabic Order* v. *Michaux, et al.*, 279 U. S. 737; *Davis* v. *Wechsler*, 263 U. S. 22. If, in such circumstances, the United States Supreme Court deems the appropriate method of review to be a petition for certiorari under Title 28, United States Code, Section 1257(3) then the Appellants respectfully request the Court to regard these appeal papers as a petition for writ of certiorari, in accord with Title 28, United States Code, Section 2103.

The Assignment of Errors

In their prosecution of this appeal the Appellants assign the following errors.

The Supreme Court of Appeals erred:

1. In holding that there no longer existed a justiciable issue to be determined by the Court.

2. In refusing the Appellants' appeal and affirming the decree of the Circuit Court of the City of Richmond which decree had adjudged and decreed that Chapter 696 of the Acts of Assembly of Virginia, 1952, is valid in all respects and is not in conflict with the laws of the United States and is not repugnant to the Constitution of the United States.

3. In failing to hold and conclude that Chapter 696 of the Acts of Assembly of Virginia, 1952, is in conflict with the Labor Management Relations Act, 1947, Title 29 United States Code, Section 141 et seq., and is repugnant to Article I, Section 8, Article VI, and the Fourteenth Amendment of the Constitution of the United States.

Statutes Involved

The state law whose validity is at issue in this appeal is Chapter 696, Acts of Assembly, 1952 (Code of Virginia, Title 56, Ch. 17, Sec. 56-509 to 56-527). The full text of this statute is set forth in Appendix C hereto.

The Labor Management Relations Act, 1947, Title 29 United States Code Section 141 et seq. provides, insofar as is directly pertinent to this appeal:

> *Section 151*—"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial interruption to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association,

self organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

Section 157—"Employees shall have the right to self organization, to form, join, or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

Section 163—"Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to effect the limitations or qualifications on that right."

Statement

The individual Appellants are officers and members of Division No. 1079, Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, A. F. L. (hereinafter referred to as "Division No. 1079") and are employees of Washington, Virginia and Maryland Coach Company, Inc. (hereinafter referred to as "the Company"). The Appellant, Division No. 1079, an unincorporated association of Arlington, Virignia, is the duly designated collective bargaining representative of the operating, maintenance and garage employees of the Company. The Company is a Virginia corporation, engaged in the business of providing public transportation by motor bus within the Commonwealth of Virginia and between points within the Commonwealth of Virginia and points within the District of Columbia. The Company operates under certificates of convenience and necessity issued by the Interstate Commerce Commission, by the State Corporation Commission of the Commonwealth of Virginia, and by the Public Utilities Commission of the District of Columbia. At least 80% of the Company's total operating reve-

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nue is received from providing transportation services between the Commonwealth of Virginia and the District of Columbia.

On September 23 and 24, 1952, the Company and Division No. 1079 exchanged correspondence looking to the commencement of negotiations for the purpose of modifying the then existing collective bargaining agreement between Division No. 1079 and the Company which was effective until and including November 23, 1952. On October 22, 1952, pursuant to the requirements of the Labor Management Relations Act, 1947, Division No. 1079 notified the Federal Mediation and Conciliation Service, the Governor of Virginia, and the Commissioner of Labor of the Virginia Department of Labor and Industry, of the existence of a dispute. Negotiations between Division No. 1079 and the Company began on October 23, 1952, and continued at various times thereafter, during which period representatives of the Federal Mediation and Conciliation Service participated in an effort to mediate the dispute.

On November 18 and 21, 1952, John S. Battle, Governor of the Commonwealth of Virginia, one of the Appellees herein, purporting to act pursuant to Chapter 696, Acts of Assembly of Virginia, 1952, issued various Proclamations and Executive Orders, directing the State Corporation Commission to take possession of and to operate the plants and equipment of the Company "whenever there occurs substantial curtailment, interruption or suspension in the operation of said Company."

Early in the morning of December 10, 1952, after negotiations had failed to produce a new agreement, and after the Company had refused to arbitrate the differences that existed, the employees of the Company engaged in a work stoppage in support of their demand that the Company grant certain wage increases and adjustments in working conditions, or agree to arbitrate such matters.

Early in the morning of December 11, 1952, the State Corporation Commission, acting through its designated agent, William C. Seibert, and in accord with the aforesaid Proclamations and Executive Orders of the Governor, seized the plants and equipment of the Company and put into actual operation and service a number of the motor vehicles of the Company. The transportation service thus provided expanded gradually, but as rapidly as available manpower would permit. The objective of the state agents operating the Company was—based upon their construction of their statutory duty—to restore the full normal service, though this was never wholly achieved. At one point, however, a special "shoppers service" was instituted. Except for a very few of the Company's regular employees who agreed to work for the Commonwealth, the transportation service was performed by regular state employees and others hired by the Agent in Charge.

Two meetings held between the Company and Division No. 1079 subsequent to the seizure failed to bring the parties any closer to a resolution of the labor dispute. At one of these the Company's president stated that he "didn't have any bus Company . . . the State was operating it, so he would sit back and take it easy." (Tr. p. 71) Thus matters stood for about a month. Finally, in the early part of January, 1953, a member of Congress (Hon. Joel T. Broyhill) intervened and on January 12, 1953, succeeded in concluding an agreement between the Company and Division No. 1079, on the basis of which the employees agreed to return to work. This agreement was ratified by the membership of Division No. 1079 at a meeting in which a resolution was unanimously adopted making it plain that the return to work at a time when the Commonwealth of Virginia still retained control over the Company's operations was under protest and did not constitute an acknowledg-

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ment of the validity of the seizure. The actual return to work occurred on January 19, 1953.

However, it was not until February 4, 1953, that the Company requested the Governor to relinquish control over the Company's operations. In an Executive Order, dated February 5, 1953, the Governor lifted the seizure, effective as of February 9, 1953.

The Bill in Equity in this case, seeking to enjoin any enforcement of the state law in question, was filed before the actual seizure was effected. It was continued after the inception of the seizure, and it had not been ruled upon by the Circuit Court of the City of Richmond when the seizure was lifted. After the seizure was lifted, Appellees, as noted above, moved to dismiss the Bill on grounds of mootness. This motion was overruled, and the Appellants' prayer for a permanent injunction against any future application or enforcement of the seizure law was denied on the merits, i.e., on the ground that in the Court's view, and contrary to the contention of the Appellants, the statute did not contravene the federal Labor Management Relations Act, 1947, and was not repugnant to any provision of the Constitution of the United States.

As already noted above, a timely petition for Appeal was filed with the Supreme Court of Appeals of Virginia, noting as error the failure of the Circuit Court to hold that the state law contravened federal law and was in conflict with those sections of the Constitution of the United States specified in the Bill in Equity. Though the particular seizure which initially provoked this suit had long been lifted the Appellants continued to press their claim that the mere existence of the seizure authority was a continuing impairment of their right to strike and a continuing interference with collective bargaining and that they were therefore entitled to permanent future relief. Nonetheless, the Supreme Court of Appeals of Virginia held, on its own

motion, that "there no longer exists a justiciable controversy." It denied the appeal, specifically noting that "the effect" of its action "is to affirm the decree" of the Circuit Court.

The Questions Are Substantial

1. The Virginia statute whose validity is in issue in this appeal has as its purpose, and certainly as its practical effect, the regulation of peaceful strikes in the industries covered by it. Once the state has seized the Company's operations the statute prohibits each and every one of the activities (including picketing) which are the normal concomitants of that concerted withholding of services which is known as a strike. As such, this statute, as a device for the regulation of strikes in public utilities, stands on precisely the same footing as the Wisconsin statute which the Supreme Court held to be unconstitutional in *Amalgamated Association, etc.* v. *Wisconsin Employment Relations Board*, 340 U. S. 383. Like the Wisconsin statute, the Virginia statute is an intrusion into a field fully occupied by Congress in the Labor Management Relations Act, 1947. And just as the device employed for regulating labor disputes in the Wisconsin statute (*i. e.*, compulsory arbitration) is a device that the Congress has specifically rejected, so also is the Virginia technique (*i. e.* seizure) one that the Congress has specifically considered and specifically rejected. Under the Commerce and the Supremacy clauses of the federal Constitution the Virginia seizure statute must fall.

2. The Virginia statute, moreover, is in direct conflict with the Labor Management Relations Act, 1947. It directly interferes with the right to strike and the right to picket both of which are specifically protected by the federal law. *Garner* v. *Teamsters Union*, 346 U. S. 485 (1953). And to the very great extent that it interferes with, disrupts and makes a mockery of collective bargaining it is repugnant

to the basic purpose and policy of the federal law. *Amalgamated Association, etc.* v. *Wisconsin Employment Relations Board, supra.*

3. There is no basis for the contention advanced by the Appellees that the statute in question is a valid exercise of the state's power of eminent domain. Assuming, *arguendo,* that the statute can be viewed as an attempt to exercise the power of eminent domain, that power, no less than a state's police power, is subject to the limitations imposed by the Commerce and Supremacy clauses of the federal Constitution. *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.,* 96 U. S. 1; *Oklahoma* v. *Kansas Natural Gas Co.,* 221 U. S. 229.

4. By interfering with the right to strike and to picket the Virginia seizure law also deprives the employees involved of liberty and property without due process of law, *Wolff Packing Company* v. *Court of Industrial Relations,* 267 U. S. 552; *American Federation of Labor* v. *Bain,* 31 Ore. 87; and interferes with freedom of speech and assemblage in contravention of the 14th Amendment of the Constitution of the United States. *American Federation of Labor* v. *Swing,* 312 U. S. 321; *Thornhill* v. *Alabama,* 310 U. S. 88.

5. The rights under the federal law and the federal Constitution which are interfered with by the Virginia seizure law are of great importance to the thousands of public utility employees in Virginia. And there is no sound basis for the refusal by the Virginia Supreme Court of Appeals for a review of the lower Court decision upholding the validity of that law on grounds of mootness. It is the province of the Supreme Court of the United States "to inquire, not only whether [a federal right] was denied in direct terms, but also whether it was denied in substance and effect by interposing a non-federal ground of decision having no fair support", *Ancient Egyptian Arabic Order* v. *Michaux, et al.,* 279 U. S. 737. For the following reasons there is no

"fair support" for a holding that this case is now, or ever was, moot:

a) The Appellants' prayer has from the beginning included a request for permanent *future* relief against the *continuing* interference with the right to strike, to picket, and to bargain collectively imposed by the Virginia seizure statute. The issues raised thereby could not, therefore, become moot solely because the particular instance of enforcement of the statute which gave rise to the suit has been terminated. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290.

b) The decision by the Supreme Court of Appeals of Virginia that the case was moot is in conflict with its own established policy (a policy likewise recognized in other jurisdictions) that a suit in equity will lie to enjoin even a *threatened* enforcement of an invalid statute. *Thompson* v. *Smith*, 155 Va. 367. *See also, Petroleum Exploration, Inc.* v. *Public Service Commission of Kentucky*, 304 U. S. 200; *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365. In accord with that policy a suit, such as this one, commenced *during* the enforcement of an allegedly invalid statute clearly cannot become moot because that particular enforcement has ceased.

c) A ruling that this case is moot also conflicts with the well established doctrine that a suit to enjoin a wrong does not become moot because the defendant has ceased his conduct unless it is clear that the abandonment of the wrong is permanent. *Securities and Exchange Commission* v. *Torr, et al.*, 87 F. (2d) 446 (CA 2); *I. A. Yarnell, et al.* v. *Hisborough Packing Co.*, 70 F. (2d) 435 (CA 5). *See also: N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261; *J. I. Case Co.* v. *N. L. R. B.*, 321 U. S. 332.

d) Finally, it must be noted that to avoid the substantive issues raised by this case by a declaration that the case became moot when the latest seizure was lifted is to say

that for all practical purposes the constitutionality of the statute in question cannot be tested. In the very nature of things it cannot be expected that any seizure which may be instituted pursuant to Chapter 696, Acts of Assembly of Virginia, 1952, will remain in effect for the period of at least two years that it will take to have a final decision on the constitutionality of the law. Far short of that time there is certain to be a resolution of the dispute which gave rise to the seizure, and a return of the operations to the owners. If a suit to enjoin the enforcement of this statute is to become moot at any time that a particular seizure is lifted there can, as a practical matter, be no test of the validity of the law in any way other than by a deliberate violation of those sections of the statute which impose criminal sanctions. That consideration, in itself, warrants a review of the merits of this case. See *Southern Pacific Terminal* v. *I. C. C.*, 219 U. S. 498; *Lansden* v. *Hart*, 180 F. (2d) 679 (CA 7).

In sum, therefore, the Appellants respectfully submit that to the extent that the court below relied on the mootness ground in denying an appeal that ground had no "fair support", and was, as the Supreme Court stated in the *Enterprise* case, *supra*, "a mere device to prevent a review of the decision upon the federal question." The Appellants believe that the issues presented by this appeal are substantial and of public importance and that the appeal should therefore be allowed.

Respectfully submitted,

BERNARD CUSHMAN,
Counsel for Appellants.

O. DAVID ZIMRING,
I. J. GROMFINE,
JUSTUS R. MOLL,
SEYMOUR J. SPELMAN,
Of Counsel.

APPENDIX "A"

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 27th day of January, 1954.

The petition of H. J. Harris, George W. Hartman, Olen B. Hiner, P. M. Brooks, and Division No. 1079 Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, A. F. L. for an appeal from a decree entered by the Circuit Court of the City of Richmond on the 12th day of June, 1953, in a certain proceeding then therein depending, wherein the said petitioners were plaintiffs and John S. Battle, Governor of Virginia, H. Lester Hooker, Chairman and W. Marshall King and Ralph T. Catterall, Members, State Corporation Commission, and William C. Seibert, Agent in Charge, were defendants, having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that there no longer exists a justiciable issue to be determined by this court, doth reject said petition, and refuse said appeal, the effect of which is to affirm the decree of the said circuit court.

A copy, Teste:

(S.) H. G. TURNER,
Clerk.

APPENDIX "B"

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

H. J. HARRIS, et al., *Complainants,*

v.

JOHN S. BATTLE, ETC., et al., *Respondents*

DECREE

This case came on to be heard on the 12th day of May, 1953, upon the complainants' amended bill for a permanent injunction, and, in the alternative, a declaratory judgment,

the respondents' answer, evidence heard *ore tenus*, exhibits filed, the respondents' motion to dismiss, oral argument and memoranda submitted by counsel, and the Court, after due consideration thereof, being of the opinion that the respondents' motion to dismiss should be overruled; that the complainants' prayer for a permanent injunction should be denied; and that Chapter 696 of the Acts of Assembly of Virginia, 1952, is not in conflict with the laws of the United States and is not repugnant to the Constitution of the United States and the Constitution of Virginia, and is valid,

It is accordingly adjudged, ordered and decreed that the motion to dismiss be, and the same hereby is, overruled; that the prayer for a permanent injunction be, and the same hereby is, denied; and that Chapter 696 of the Acts of Assembly of Virginia, 1952, be, and the same hereby is, declared to be valid in all respects, to which ruling and action of the Court in denying the prayer for a permanent injunction and declaring Chapter 696 of the Acts of Assembly of Virginia, 1952, valid in all respects, the complainants, by counsel, objected and prayed that there exception be noted of record, which is accordingly done.

It is further adjudged, ordered and decreed that the respondents recover their costs in this behalf expended.

I ask for this:

—— ——,
Counsel for Respondents.

Seen:

—— ——,
Counsel for Complainants.

APPENDIX "C"

Chapter 696

An Act to prevent interruption or suspensions in the operation of certain public utilities, and to that end to declare it to be the public policy of the State that the functioning and operation of such utilities are clothed with a public interest and are essential to the health, safety and wel-

fare of the citizens of Virginia; to authorize the Governor to take possession of and operate on behalf of the State, public utilities and to prescribe the terms and conditions of such taking possession of and operation, and the power, authority and duty of the Governor with respect thereto; to provide how any such utility may be returned to private management and control; to declare certain acts unlawful; and to impose penalties. (H 704)

Approved April 7, 1952

Be it enacted by the General Assembly of Virginia:

1. § 1. The continuous, uninterrupted and proper functioning and operation of public utilities engaged in the business of furnishing water, light, heat, gas, electric power, transportation or communication, or any one or more of them, to the people of Virginia are hereby declared to be essential to their welfare, health and safety. It is contrary to the public policy of the State to permit any substantial impairment or suspension of the operation of any such utility and it is the duty of the Government of the State to exercise all available means and every power at its command to prevent the same so as to protect its citizens from any dangers, perils, calamities or catastrophes which would result therefrom. It is therefore further declared that such utilities are clothed with a vital public interest and to protect the same it is necessary that impairment or suspension of the operation of any such utility for any reason be prevented to the extent and by the means hereinafter provided.

§ 2. Whenever in the judgment of the Governor there is an imminent threat of substantial curtailment, interruption or suspension in the operation of any public utility hereinabove mentioned he shall promptly make an investigation to determine whether, in his opinion, an actual curtailment, interruption or suspension of operation will constitute a serious menace or threat to the public health, safety or welfare, and if he concludes that it will, he shall forthwith issue an executive proclamation so declaring and stating that at the time of such curtailment, interruption or suspension of operation he will take immediate possession of the

utility, its plant and equipment, or so much thereof as may be necessary, for the use of and operation by the Commonwealth. Where the Governor finds it advisable for effectuation of the purposes hereof he may by proclamation advance or defer such taking of possession.

§ 3. The Governor may possess and operate such properties in the manner hereinafter provided and through such department or agency of the State as he may designate.

§ 4. If the Governor shall issue a proclamation of intention to take possession of and operate any such utility as provided herein, he shall immediately ascertain what positions of employment are necessary to be filled in order to operate the same to such extent as may be required to protect the public safety and welfare, and the duties incident to each such position, and shall ascertain from those persons then employed in such positions whether they will accept employment by the State to perform like duties for the State. Any such person who will accept employment by the State shall be entitled to be employed and to continue in such employment for such time as the Governor may determine. It shall be the duty of the management of any such utility to provide promptly and furnish to the Governor, upon his request, detailed information with respect to the positions necessary to be filled and the duties incident to or pertaining to each such position, and the name of the person presently holding same.

§ 5. In the event that any person or persons then employed by the utility in any such necessary positions shall fail to indicate an intention to work for the State in operating the utility, when inquiry is made of such person by the Governor or his agent, the Governor shall immediately institute measures to employ another person or other persons to perform the required duties of any one not indicating such intention. No person who upon such inquiry fails to indicate intention to work for the State may thereafter claim the right to employment by the State provided in § 4 of this act.

§ 6. The status of no person as an employee of the utility shall be affected by either his acceptance of employment by the State or by his refusal of such employment.

§ 7. After any proclamation of intention to take possession, the Governor may, by and through agents designated by him, enter upon the property of the utility with prospective employees and familiarize them with the nature of the work incident to the positions in which it is contemplated they will be employed and train them to discharge the duties thereof. The management of the utility and all State departments, institutions and agencies shall cooperate with the Governor in the operation of the utility and in the securing and training of persons for employment in such operation.

§ 8. Unless the management of the utility believes that the Governor is mistaken in his conclusion as to the curtailment, interruption or suspension of operation, actual possession of the utility, its properties and facilities, shall be delivered at the time stated in the executive proclamation. In the event of refusal of possession, upon application of the Governor any court of record of any county or city in which the utility's main executive offices in this State are located, or the judge thereof in vacation, shall issue a rule requiring the authorized representatives of such utility to show cause why possession should not be delivered at the time stated in the executive proclamation. The rule shall be given preference over all other matters pending before such court. After reasonable notice, the court or judge shall hear the parties and determine as promptly as possible the question of fact relating to the curtailment, interruption or suspension of the operation of the utility and whether the facts require the delivery of possession and render judgment requiring or denying delivery of possession as the case may be.

§ 9. No person, organization or association or any bargaining representative of the employees or any representative or agent of the management of the utility shall interfere with or obstruct the Governor, or any State representative or agent designated by him, in his efforts to secure or contract for the services of the officers and employees of the utility or of any person to engage in or continue the operation of the utility, or shall encourage or solicit any such persons not to render such services or shall interfere

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in or obstruct the training of prospective employees in the operation of the utility by the Governor or by the designated State representatives. Upon seizure of any utility as provided herein the establishment or conduct of a picket line near or adjacent to any work engaged in or proposed to be engaged in by any such persons employed or sought to be employed by the State in its operation of such utility shall be deemed an unlawful obstruction of the exercise of an essential function of the State Government and a violation of this section; and all persons ordering, directing, encouraging or participating in any such picketing shall be guilty of violating this section.

§ 10. The expense of operating any utility pursuant to the provisions of this act, and of training prospective employees or otherwise preparing to operate the same shall be paid out of the appropriation for criminal charges upon such authorizations as the Governor may prescribe, and all funds, revenues or reimbursements derived from or received as a result of such operations shall be paid into the State treasury and credited to such appropriation, or, after full reimbursement of such appropriation for expenditures therefrom, additional funds may be credited to such other appropriations as the Governor may direct, and subsequent disbursements in carrying out the purposes of this act may be made therefrom.

§ 11. During the period of the State's operation of any utility, pursuant to the provisions of this act, the Governor shall observe the utility's previously established salaries, wages, conditions of employment, practices as to merit or length of service increases and as to promotions; it being the intent of this act that any disputes as to such matters shall be settled by collective bargaining between the parties to such disputes.

§ 12. The Governor may provide in such manner as he deems appropriate for the collection of the gross revenues accruing from the utility during the time of its operation by the State. After payment of proper operating expenses and reimbursement of the State for all expenses incurred in preparing to operate same and making allowances of the additional items as provided in § 15 of this act in defining

net income, eighty-five per centum of the net income shall be paid to the utility as compensation for the temporary use of its business, facilities and properties. The amount of money so paid shall in no wise control the amount of just compensation to be allowed the utility. In the event of disagreement as to the amount of payments under this section, either party may, by appropriate petition, submit the matter to the State Corporation Commission with the right of appeal from its decision to the Supreme Court of Appeals.

§ 13. Whenever the authorized representatives of any such utility shall notify the Governor, in writing, stating that the utility is in position to and can and will resume operations and render normal public service and shall satisfy the Governor, or his designated agent, of the correctness of such statement, the Governor, or such agent, upon the request of the utility management, shall restore to the possession of the utility its properties and facilities. In the event that the Governor or such agent for any reason refuses such restoration of possession, the utility shall have the right to have a rule issued by any court of general chancery jurisdiction in the city of Richmond, or the judge thereof in vacation, to show cause why such possession should not be restored. The rule shall provide for ten days' notice to the Governor or such agent before cause is required to be shown. The decision of such court, or the judge thereof in vacation, on such question shall be final as to conditions then existing, but shall not be a bar to subsequent requests by the utility for restoration of possession. Nothing in this section shall be construed as denying to the Governor the right to restore possession at any time when, in his judgment, the public interest so requires.

§ 14. The utility shall be entitled to receive reasonable, proper and lawful compensation for the use of its business, facilities and properties by the State. In the event the parties in interest are unable to agree upon the amount of such compensation either party may file a petition in the court rendering judgment requiring delivery of possession of the utility, or in the event no such judgment was rendered, in any court mentioned in § 8 of this act, for the purpose of having the same judicially determined. The court

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shall, without a jury, hear such evidence and argument of counsel as may be deemed appropriate and render judgment thereon or may refer to a commissioner such questions as are considered proper and act upon the commissioner's report as in ordinary chancery proceedings. An appeal shall be to the Supreme Court of Appeals from any final judgment of the court rendered under this section. If the amount of compensation so determined shall be less than the sum paid to the utility under the provisions of § 12 of this act the utility shall return the excess by paying the same to the State Treasurer to be credited as the Governor may direct in accordance with the provisions of § 10 of this act.

§ 15. The words "utilities" or "public utilities" when used in this act shall be construed to mean any person, partnership, association or corporation engaged in the business of furnishing electric power, water, light, heat, gas, transportation or communication, or any one or more of them to the people of Virginia.

"Net income" with respect to operation of a utility by the State shall be construed to mean the gross revenues derived from such operation after deducting therefrom:

(1) The costs of operation and maintenance of the utility,

(2) The amount of depreciation during the time of such operation based on the amount allowed in the utility's federal income tax return,

(3) Federal, State, and local taxes which would be payable by the utility, if the properties were operated by it,

(4) Interest on the indebtedness of the utility, and

(5) Payments for the cost of insurance.

All of such items shall be prorated on an annual basis in proportion to the time the plant is operated by the State.

§ 16. Any person violating any of the provisions of §§ 4, 7 or 9 of this act shall be guilty of a misdemeanor and upon conviction of same shall be fined not less than ten nor more than one thousand dollars, and may be imprisoned in jail for not more than twelve months.

§ 17. In addition to the remedies herein provided, the Governor is hereby authorized to apply to the Circuit Court of the City of Richmond or to any court mentioned in § 8

of this act for, and such court shall have jurisdiction upon hearing and for cause shown to grant a temporary or permanent injunction restraining any person, organization, association or corporation from violating any provision of this act irrespective of whether or not there exists an adequate remedy at law.

§ 18. It shall be the duty of every attorney for the Commonwealth to whom the Governor shall report any violation of §§ 4, 7 or 9 of this act to cause proceedings to be prosecuted without delay for the fines and penalties in such cases. The Attorney General shall be charged with the duty of enforcing all other provisions of this act and shall represent the Governor in all matters arising thereunder. Whenever he shall deem it in the best interest of the State the Attorney General may employ special counsel to assist him in carrying out the duties imposed by this section and the expense so incurred shall be considered as an expense of operation of the utility and paid in accordance with the provisions of § 10 of this act.

§ 19. Nothing in this act shall apply to any express company, sleeping car company, common carrier engaged in interstate commerce by railroad or by air or to any company which is directly or indirectly owned or controlled by any carrier by railroad.

§ 20. Nothing in this act shall be considered or construed as in any way questioning or impairing the constitutional or statutory powers of the Governor as commander in chief of the land and naval forces of the State.

2. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or applications, and to this end the provisions of this act are declared to be severable.

3. An emergency exists and this act is in force from its passage.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 111

H. J. HARRIS, GEORGE W. HARTMAN, OLEN B. HINER, P. M. BROOKS, AND DIVISION NO. 1079, AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, A. F. L.,

Appellants,

v.

JOHN S. BATTLE, GOVERNOR OF THE COMMONWEALTH OF VIRGINIA, H. LESTER HOOKER, CHAIRMAN, AND W. MARSHALL KING AND RALPH T. CATTERALL, MEMBERS, STATE CORPORATION COMMISSION, AND WILLIAM C. SEIBERT, AGENT IN CHARGE,

Appellees

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO DISMISS

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 111

H. J. HARRIS, GEORGE W. HARTMAN, OLEN B. HINER, P. M. BROOKS, AND DIVISION NO. 1079, AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, A. F. L.,

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Appellees

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO DISMISS

The appellees, believing that the matters set forth herein will demonstrate the lack of jurisdiction of this Court and, further, the lack of substance in the questions presented

by this appeal, file this statement in opposition to the appellants' statement as to jurisdiction. The appellees include herein their motion to dismiss the appeal on the ground that the appeal was directed to the wrong state court and on the further ground that the decision below was not rested on a federal question or, in the alternative, to dismiss or affirm the order of the court below on the ground that the federal questions raised on behalf of the appellants are so unsubstantial as not to need further argument. The matters here relied upon are more particularly stated below.

I

The State Statute Involved and the Nature of the Case

A. *The Statute*

The appellants contend that Chapter 696 of the Acts of Assembly of Virginia, 1952 (Sections 56-509 to 56-528, inclusive, of the Code of Virginia, as amended) conflicts with the laws of the United States and is repugnant to the Constitution of the United States. The Act may be summarized by quoting its title, which reads as follows:

> "An Act to prevent interruption or suspensions in the operation of certain public utilities, and to that end to declare it to be the public policy of the State that the functioning and operation of such utilities are clothed with a public interest and are essential to the health, safety and welfare of the citizens of Virginia; to authorize the Governor to take possession of and operate on behalf of the State public utilities and to prescribe the terms and conditions of such taking possession of and operation, and the power, authority and duty of the Governor with respect thereto; to provide how any such utility may be returned to private management and control; to declare certain acts unlawful; and to impose penalties."

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Appendix A, attached hereto, contains the full text of the statute.

B. *Statement of the Case and the Proceedings Below*

1. The Washington, Virginia and Maryland Coach Company, Incorporated, (Arnold Bus Line) and Division No. 1079, Amalgamated Association of Street Electric Railway and Motor Coach Employees of America, A. F. of L. exchanged correspondence on September 23-24, 1952, looking to the commencement of negotiations for the purpose of modifying the existing agreement between them which was effective through November 23, 1952.

2. On October 23, 1952, negotiations between the Company and the Union began and continued thereafter. A representative of the Federal Mediation and Conciliation Service participated in the mediation of this dispute. (Notice of the existing said dispute was sent out to the proper parties on October 22, 1952, pursuant to the Taft-Hartley Act).

3. On November 13, 1952, John S. Battle, Governor of Virginia, pursuant to the Virginia Public Utilities Act, (Chapter 17 of Title 56 of the Code of Virginia, Sections 56-509—56-527), issued a proclamation stating that he would take possession of the Company at 12:01 a.m. on November 24, 1952, to protect the public health, safety and welfare if a cessation of work occurred.

4. On November 21, 1952, the Governor issued a second proclamation stating that there apparently would be no interruption of service on November 24, but since the threat of such interruption continued he directed his agents to seize the Company "whenever there occurs substantial curtailment, interruption or suspension in the operation of said Company". The members of the State Corporation Commission were designated as the agents of the Governor

and thereafter the Corporation Commission designated William C. Seibert as "Agent in Charge".

5. On December 10, 1952, after negotiations had failed to produce a new agreement, the Union engaged in a strike against the Company in support of their bargaining demands.

6. On December 11, 1952, the Governor, acting through his designated agents, took possession of the plants and equipment of the Company and began the operation of it.

7. On December 23, 1952, the appellants filed an amended bill in chancery praying for a preliminary injunction in the Circuit Court of the City of Richmond, Virginia, restraining appellees from exercising any dominion or control over the property of the Company. The Circuit Court refused to grant this preliminary injunction.

8. On February 5, 1953, it appearing to the Governor that the Company was then in a position to resume its normal operations, he issued a proclamation placing the Bus Line back under the control of its owners on February 9, 1953. Since that time he has exercised no dominion or control over the plant, equipment or operation of it.

9. On May 12, 1953, the said Circuit Court heard this case upon the appellants' amended bill for a permanent injunction, and in the alternative, a declaratory judgment.

10. On June 12, 1953, the Circuit Court entered its decree denying the permanent injunction and declaring Chapter 696 of the Acts of Assembly of Virginia, 1952, (Sections 56-509 to 56-528 of the Code) valid in all respects.

11. On January 21, 1954, John S. Battle's term of office as Governor of Virginia expired, and he was succeeded by Thomas B. Stanley.

12. On January 27, 1954, almost one year after John S. Battle had relinquished all possession of and control over the property of the Company, the court below entered its

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order refusing an appeal from the above-mentioned decree of the Circuit Court, stating therein:

> "The petition * * * having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that there no longer exists a justiciable issue to be determined by this court, doth reject said petition, and refuse said appeal, the effect of which is to affirm the decree of the said circuit court."

C. *The Questions Presented*

1. Should not this appeal have been directed to the Circuit Court of the City of Richmond, Virginia, the highest court of the State for the purposes of this case?

2. Does this Court have jurisdiction to review the decision of the court below since such decision rested on a non-federal ground?

3. Is Chapter 696 of the Acts of Assembly of Virginia, 1952, in conflict with the Labor Management Relations Act of 1947?

4. Is Chapter 696 of the Acts of Assembly of Virginia, 1952 repugnant to the Constitution of the United States and the Amendments thereto?

II

Argument

A. *This Appeal Should Be Dismissed on the Ground that It Was Directed to the Wrong State Court*

The Supreme Court of Appeals of Virginia refused to take jurisdiction of the case on its merits, giving as its reason that there no longer existed a justiciable controversy. Thus, the court below has not given a decision in favor of the validity of a state statute. Instead, it declined to take jurisdiction of the case. Therefore, if the appellants have an appeal to this Court, it is from the decree of

the Circuit Court of the City of Richmond. The judgment of that court is that of the highest court of the State for the purpose of this appeal, since the highest state tribunal has denied a writ of error to the inferior court solely and expressly for want of jurisdiction. *Randall* v. *Board of Commissioners*, 261 U.S. 252; *Virginian Ry. Co.* v. *Mullens*, 271 U.S. 220; *Cuwahoga River Power Co.* v. *Northern Realty Co.*, 244 U.S. 300; *Norfolk & S. Turnpike Co.* v. *Virginia*, 225 U.S. 264; *Western Union Telegraph Co.* v. *Crovo*, 220 U.S. 364; *Western Union Telegraph Co.* v. *Hughes*, 203 U.S. 505; *Bacon* v. *Texas*, 163 U.S. 207; *Stanley* v. *Schwalby*, 162 U.S. 255.

The appellants take the position that, since the court below, in refusing the appeal, stated that the effect of its action was to affirm the decree of circuit court, this Court should hold that the court below decided the case on its merits. When the court below dismissed the writ of error to the Circuit Court of the City of Richmond solely for want of jurisdiction, the obvious and only effect of such action was to leave the decree of the said circuit court as it originally was entered.

The Supreme Court of Appeals of Virginia did not state that the effect of its order was to sustain the constitutionality of the state statute involved. It did not say the decree was "plainly right", as is customary when an appeal is denied on the merits. The court below merely said that, because it could not consider the matter on its merits for want of jurisdiction, it could not alter the final decree of the Circuit Court of the City of Richmond. Therefore, the appeal to this Court should be dismissed as having been brought contrary to law. *Randall* v. *Board of Commissioners*, 261 U.S. 252; *Western Union Telegraph Co.* v. *Hughes*, 203 U.S. 505; *Norfolk & S. Turnpike Co.* v. *Virginia*, 225 U.S. 264.

The appellants request this Court to regard their appeal papers as a petition for writ of certiorari, in accordance with Title 28, United States Code, § 2103, if it deems a petition for writ of certiorari to be the appropriate method of review under the circumstances of this case. If the highest court of a state dismisses a writ of error or petition for certiorari for want of jurisdiction and does not pass on the merits of the case, the writ of certiorari of this Court should be directed to the inferior court which enters the final decree. Unless this be done, a writ of certiorari to the highest court of the state will be dismissed by this Court. *Western Union Telegraph Co.* v. *Priester*, 276 U.S. 252; *American Railway Express Co.* v. *Levee*, 263 U.S. 19.

Thus, it can be seen that the same principles of law govern writs of certiorari as govern petitions for appeal, insofar as proper state courts are concerned. The authorities for the two are cited interchangeably. Therefore, if this Court regards the appeal papers in this case as a petition for writ of certiorari in accordance with Title 28 United States Code, § 2103, the petition should still be dismissed on the authority of the cases cited above.

B. *This Appeal Should Be Dismissed Since the Decision of the Court Below Rests on a Non-Federal Ground*

This Court will not review decisions of state courts when their decisions rest on non-federal grounds. *Hedgebeth* v. *North Carolina*, 334 U. S. 806; *McCoy* v. *Shaw*, 277 U. S. 302; and *Howat* v. *Kansas*, 258 U. S. 181. Furthermore, this Court has repeatedly held that it is without jurisdiction to review a judgment of a state court unless it *clearly* appears that the decision turned on a federal question. *Stembridge* v. *Georgia*, 343 U. S. 541 and *Copperweld Steel Co.* v. *Industrial Commission*, 324 U. S. 780.

The order of the court below does not clearly indicate that the decision rested on a federal ground. To the contrary, the order below clearly indicates on its face that the decision rested on a non-federal ground. It recites that the appellants' appeal was refused because the court was "of opinion that there no longer exists a justiciable issue to be determined * * *".

However, the appellants allege that the order of the court below disposing of the case on the non-federal ground of mootness is so untenable and unfounded that it is arbitrary and a mere devise to prevent a review by this Court. They thus urge that this Court has jurisdiction and should review the decision of the court below. It is true that if a state court decision on a non-federal ground is plainly unfounded this Court may review such a decision. Likewise, it is true that if the non-federal ground of decision has fair support, this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own views of what is the better rule. *Broad R.P. Co.* v. *South Carolina*, 281 U.S. 537; *Fox River Paper Co.* v. *Railroad Commission*, 274 U. S. 651; and *Enterprise Irrig. Dist.* v. *Farmers Mut. Canal Co.*, 243 U.S. 157.

The Supreme Court of Appeals of Virginia has repeatedly held that it will not sit to determine moot questions. Only real controversies are entitled to invoke its jurisdiction, and whenever it appears that no controversy exists or, if one did exist, it has ceased to exist, the case before it will be dismissed. *Miller* v. *Union of United Brewery*, 187 Va. 889; *Hankins* v. *Virginia Beach*, 182 Va. 642; *Flicklen* v. *Danville*, 146 Va. 426; *Gilmer* v. *Francisco*, 131 Va. 47; and *Franklin* v. *Peers*, 95 Va. 602.

As already pointed out, on December 11, 1952, John S. Battle, then Governor of Virginia, exercised the State's power of eminent domain, which had been delegated to him

by the General Assembly of Virginia under the authority of the statute here involved, and took possession of the property of the bus line. Subsequent to that date, the Circuit Court of the City of Richmond denied the extraordinary remedy of a preliminary injunction. On February 9, 1953 the State returned the property of the Company to its original owner. Since that time the State has exercised no dominion or control over the property and has not threatened to do so. The prayer for a permanent injunction was denied three months later, on May 12, 1953. Almost one year after the State had relinquished control of the property, and one week after John S. Battle had vacated the office of Governor of Virginia, the court below considered and refused the petition for a writ of error filed by the appellants.

Under such circumstances the court below had ample justification in both the law and the evidence to refuse to consider the appellants' petition for a writ of error on the ground that there no longer existed a justiciable controversy. John S. Battle and his duly authorized agents had surrendered control of the property almost a year previously and they had not threatened to seize the property after that time. In fact, John S. Battle was no longer Governor of Virginia and an injunction order restraining him would be of no effect whatsoever.

The position taken by the court below coincides with that taken by this Court in numerous cases. See, *Congress of Industrial Organizations* v. *McAdory*, 325 U. S. 472; *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450; *Love* v. *Griffith*, 266 U. S. 32; *KFAB Broadcasting Co.* v. *Sorenson*, 290 U. S. 599; *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360; *Shaffer* v. *Howard*, 249 U. S. 200; *Standard Oil Co.* v. *United States*, 283 U. S. 163.

It is clear, then, that the non-federal question of moot-

ness on which the court below based its decision is not untenable and so unfounded that it may be regarded as arbitrary.

Finally, the appellants contend that if the suit to enjoin the enforcement of the statute and the orders promulgated thereunder becomes moot when the property is returned by the State, there can be no test of the validity of the law. This consideration alone, it is urged, warrants a review by this Court. While the appellants' contention would not necessarily be true, it is not a valid argument. In *Montgomery B. & C. T. C.* v. *Ledbetter Erec. Co.*, 344 U. S. 178, it was held that however appealing such an argument might be, it does not warrant the enlargement of this Court's jurisdiction.

C. *Should This Court Reject the Appellees' Motion to Dismiss for Lack of Jurisdiction the Case Should Be Remanded to the Court Below for Decision on the Merits*

If this Court rejects the appellees' motion to dismiss this appeal for want of jurisdiction, the constitutionality of the state statute involved should not be considered at this time. The court below has not construed the said statute nor considered its constitutionality. Under such circumstances, this Court should remand the case with directions that it be considered on its merits. *Dean Milk Co.* v. *Madison*, 340 U. S. 349; *Musser* v. *Utah*, 333 U. S. 95.

D. *The Virginia Statute Is Not In Conflict With the Labor Management Relations Act of 1947*

The Virginia statute has for its purpose the continuous and uninterrupted functioning of certain public utilities clothed with a public interest. In order to carry out this purpose, the General Assembly of Virginia, in the exercise

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of the sovereign power of eminent domain, has authorized the Governor of Virginia to seize the property of any utility if its operation is impaired or suspended *for any reason.* The statute does not regulate labor disputes, prohibit strikes or interfere with collective bargaining. It does not conflict with sections 151 and 157 of Title 29, U. S. Code or any other provisions of the Labor Management Relations Act of 1947. To the contrary, the state statute expressly provides that labor disputes shall be settled by collective bargaining between the parties to such disputes. § 56-519, Code of Virginia.

The record shows that the State in no way interfered with employees' right of collective bargaining (Tr. pp. 76, 77). Furthermore, the president of the local union testified that collective bargaining between the union and the company continued after state seizure (Tr. p. 70). It is clear, therefore, that the Virginia statute is not in conflict with federal legislation.

The statute condemned by this Court in *Amalgamated Association* v. *Wisconsin Employment Relations Board,* 340 U. S. 383, invaded the field of labor relations already occupied by federal legislation. *Garner v. Teamsters, C. & H. Union,* — U. S. —, 98 L. Ed. 161, held that the Labor Relations Act of Pennsylvania did likewise.

The Virginia statute simply permits the exercise of the power of eminent domain for the protection and safety of Virginia citizens. It does not regulate public utilities or labor disputes. Certainly, there can be no question of the fact that the Governor of Virginia could, even in absence of legislation, call out the state militia and seize the utility if conditions became sufficiently serious. When the health, safety and welfare of a community are endangered a state has the power to deal with such emergencies. *Munn* v. *Illinois,* 94 U. S. 113.

While it may be true that a state is not permitted to enact concurrent legislation of peaceful strikes for higher wages since the Congress has occupied the field, the Virginia statute does not attempt to do so. The Virginia statute has not entered this field. It simply protects its citizens by permitting the Governor to exercise the sovereign power of eminent domain.

E. *The Virginia Statute is Not Repugnant to the Constitution of the United States*

States are, of course, subject to the limitations imposed by the Commerce Clause and the Supremacy Clause of the Constitution of the United States. However, it is equally true that when there is no conflict between state and federal legislation, and there is no undue burden upon interstate commerce, this Court will not strike down state legislation.

As already pointed out, the State does not attempt to regulate labor disputes. Furthermore, the State does not attempt to regulate commerce. It merely attempts to protect its citizens in times of emergency. In the instant case the local transit system served Arlington County, Virginia, and the District of Columbia. Many persons in the Arlington area were dependent upon this bus line for transportation to and from work, a great number of them employed at the Pentagon and engaged in defense work. When the employees were on strike, sections of the heavily populated Arlington County were left without transportation. The State's seizure and operation of the bus line, therefore, created no burden on interstate commerce and was not an interference with interstate commerce. *Rather, it restored partial operation of the bus line and helped insure the flow of commerce to the benefit and protection of the health, safety and welfare of the public.*

The right of every state to exercise the power of eminent domain is an inherent power. Further, such power was not surrendered by the states to the United States. *Cincinnati* v. *Louisville & N. R. Co.*, 223 U. S. 390.

Finally, it is urged that the Virginia statute interferes with freedom of speech since it provides that the establishment of a picket line near or adjacent to the property operated by the State shall be deemed an unlawful obstruction of the exercise of an essential function of government. See, section 56-517, Code of Virginia.

Peaceful picketing is no longer considered merely free speech. *Carpenters and Joiners Union* v. *Ritter's Cafe*, 315 U. S. 722. Compare, *Thornhill* v. *Alabama*, 310 U. S. 88. Furthermore, this Court held in *Bakery and Pastry Drivers' Union* v. *Wohl*, 315 U. S. 769, that a state court is free to enjoin peaceful picketing when no labor dispute exists between the union and the employer.

In the instant case, there was no dispute between the State and its employees and, in fact, no picketing was attempted by anyone. Furthermore, the appellees are aware of no case which holds that the Fourteenth Amendment protects picketing which may interfere with an essential function of State government.

III

Conclusion

Wherefore, the appellees respectfully submit this statement showing that the questions upon which the decision of this case depends are so unsubstantial as not to need further argument; and the appellees respectfully move the Court to dismiss this appeal, or, in the alternative, to affirm the order of the court below.

Respectfully submitted,

J. Lindsay Almond, Jr.
Attorney General of Virginia.

C. F. Hicks,
Assistant Attorney General of Virginia.

Henry T. Wickham,
Special Counsel,
1407 State-Planters Bank Bldg.,
Richmond, Virginia.

May 13, 1953.

APPENDIX A

Chapter 17, Title 56, Code of Virginia

(Chapter 696, Acts of Assembly, 1952)

§ 56-509. Declaration of policy.—The continuous, uninterrupted and proper functioning and operation of public utilities engaged in the business of furnishing water, light, heat, gas, electric power, transportation or communication, or any one or more of them, to the people of Virginia are hereby declared to be essential to their welfare, health and safety. It is contrary to the public policy of the State to permit any substantial impairment or suspension of the operation of any such utility and it is the duty of the government of the State to exercise all available means and every power at its command to prevent the same so as to protect its citizens from any dangers, perils, calamities or catastrophes which would result therefrom. It is therefore further declared that such utilities are clothed with a vital public interest and to protect the same it is necessary that impairment or suspension of the operation of any such utility for any reason be prevented to the extent and by the means hereinafter provided.

§ 56-510. Duty of Governor when there is threat of curtailment, interruption, etc., of operation.—Whenever in the judgment of the Governor there is an imminent threat of substantial curtailment, interruption or suspension in the operation of any public utility hereinabove mentioned he shall promptly make an investigation to determine whether, in his opinion, an actual curtailment, interruption or suspension of operation will constitute a serious menace or threat to the public health, safety or welfare, and if he concludes that it will, he shall forthwith issue an executive proclamation so declaring and stating that at the time of such curtailment, interruption or suspension of operation he will take immediate possession of the utility, its plant and equipment, or so much thereof as may be necessary, for the use of and operation by the Commonwealth. Where the Governor finds it advisable for effectuation of the pur-

poses hereof he may by proclamation advance or defer such taking of possession.

§ 56-511. Power of Governor to possess and operate utility.—The Governor may possess and operate such properties in the manner hereinafter provided and through such department or agency of the State as he may designate.

§ 56-512. Employment of utility employees by State; information to be furnished.—If the Governor shall issue a proclamation of intention to take possession of and operate any such utility as provided herein, he shall immediately ascertain what positions of employment are necessary to be filled in order to operate the same to such extent as may be required to protect the public safety and welfare, and the duties incident to each such position, and shall ascertain from those persons then employed in such positions whether they will accept employment by the State to perform like duties for the State. Any such person who will accept employment by the State shall be entitled to be employed and to continue in such employment for such time as the Governor may determine. It shall be the duty of the management of any such utility to provide promptly and furnish to the Governor, upon his request, detailed information with respect to the positions necessary to be filled and the duties incident to or pertaining to each such position, and the name of the person presently holding same.

§ 56-513. Replacement of utility employees unwilling to work for State.—In the event that any person or persons then employed by the utility in any such necessary positions shall fail to indicate an intention to work for the State in operating the utility, when inquiry is made of such person by the Governor or his agent, the Governor shall immediately institute measures to employ another person or other persons to perform the required duties of any one not indicating such intention. No person who upon such inquiry fails to indicate intention to work for the State may thereafter claim the right to employment by the State provided in § 56-512.

§ 56-514. Status as employee of utility unaffected by acceptance or refusal of employment by State.—The status of no person as an employee of the utility shall be affected

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by either his acceptance of employment by the State or by his refusal of such employment.

§ 56-515. Entry upon property of utility after proclamation of intention to take possession.—After any proclamation of intention to take possession the Governor may, by and through agents designated by him, enter upon the property of the utility with prospective employees and familiarize them with the nature of the work incident to the positions in which it is contemplated they will be employed and train them to discharge the duties, thereof. The management of the utility and all State departments, institutions and agencies shall cooperate with the Governor in the operation of the utility and in the securing and training of persons for employment in such operation.

§ 56-516. When possession of utility to be delivered; procedure upon refusal of possession.—Unless the management of the utility believes that the Governor is mistaken in his conclusion as to the curtailment, interruption or suspension of operation, actual possession of the utility, its properties and facilities, shall be delivered at the time stated in the executive proclamation. In the event of refusal of possession, upon application of the Governor any court of record of any county or city in which the utility's main executive offices in this State are located, or the judge thereof in vacation, shall issue a rule requiring the authorized representatives of such utility to show cause why possession should not be delivered at the time stated in the executive proclamation. The rule shall be given preference over all other matters pending before such court. After reasonable notice, the court or judge shall hear the parties and determine as promptly as possible the question of fact relating to the curtailment, interruption or suspension of the operation of the utility and whether the facts require the delivery of possession and render judgment requiring or denying delivery of possession as the case may be.

§ 56-517. Interference with or obstruction of Governor, State representative or agent.—No person, organization or association or any bargaining representative of the employees or any representative or agent of the management of the utility shall interfere with or obstruct the Governor,

or any State representative or agent designated by him, in his efforts to secure or contract for the services of the officers and employees of the utility or of any person to engage in or continue the operation of the utility, or shall encourage or solicit any such persons not to render such services or shall interfere in or obstruct the training of prospective employees in the operation of the utility by the Governor or by the designated State representatives. Upon seizure of any utility as provided herein the establishment or conduct of a picket line near or adjacent to any work engaged in or proposed to be engaged in by any such persons employed or sought to be employed by the State in its operation of such utility shall be deemed an unlawful obstruction of the exercise of an essential function of the State Government and a violation of this section; and all persons ordering, directing, encouraging or participating in any such picketing shall be guilty of violating this section.

§ 56-518. Expense of operation, etc.; payment of revenues, etc., into State treasury.—The expense of operating any utility pursuant to the provisions of this chapter, and of training prospective employees or otherwise preparing to operate the same shall be paid out of the appropriation for criminal charges upon such authorizations as the Governor may prescribe, and all funds, revenues or reimbursements derived from or received as a result of such operations shall be paid into the State treasury and credited to such appropriation, or, after full reimbursement of such appropriation for expenditures therefrom, additional funds may be credited to such other appropriations as the Governor may direct, and subsequent disbursements in carrying out the purposes of this chapter may be made therefrom.

§ 56-519. Previously established salaries, wages, conditions of employment, etc., to be observed; collective bargaining.—During the period of the State's operation of any utility, pursuant to the provisions of this chapter, the Governor shall observe the utility's previously established salaries, wages, conditions of employment, practices as to merit or length of service increases and as to promotions; it being the intent of this chapter that any disputes as to

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such matters shall be settled by collective bargaining between the parties to such disputes.

§ 56-520. Collection and disposition of revenues accruing from utility.—The Governor may provide in such manner as he deems appropriate for the collection of the gross revenues accruing from the utility during the time of its oepration by the State. After payment of proper operating expenses and reimbursement of the State for all expenses incurred in preparing to operate same and making allowances of the additional items as provided in § 56-523 in defining net income, eighty-five per centum of the net income shall be paid to the utility as compensation for the temporary use of its business, facilities and properties. The amount of money so paid shall in nowise control the amount of just compensation to be allowed the utility. In the event of disagreement as to the amount of payments under this section, either party may, by appropriate petition, submit the matter to the State Corporation Commission with the right of appeal from its decision to the Supreme Court of Appeals.

§ 56-521. Restoring possession to utility.—Whenever the authorized representatives of any such utility shall notify the Governor, in writing, stating that the utility is in position to and can and will resume operations and render normal public service, and shall satisfy the Governor, or his designated agent of the correctness of such statement, the Governor, or such agent, upon the request of the utility management, shall restore to the possession of the utility its properties and facilities. In the event that the Governor or such agent for any reason refuses such restoration of possession, the utility shall have the right to have a rule issued by any court of general chancery jurisdiction in the city of Richmond, or the judge thereof in vacation, to show cause why such possession should not be restored. The rule shall provide for ten days' notice to the Governor or such agent before cause is required to be shown. The decision of such court, or the judge thereof in vacation, on such question shall be final as to conditions then existing, but shall not be a bar to subsequent requests by the utility for restoration of possession. Nothing in this section shall be con-

strued as denying to the Governor the right to restore possession at any time when, in his judgment, the public interest so requires.

§ 56-522. Compensation to utility.—The utility shall be entitled to receive reasonable, proper and lawful compensation for the use of its business, facilities and properties by the State. In the event the parties in interest are unable to agree upon the amount of such compensation either party may file a petition in the court rendering judgment requiring delivery of possession of the utility, or in the event no such judgment was rendered, in any court mentioned in § 56-516, for the purpose of having the same judicially determined. The court shall, without a jury, hear such evidence and argument of counsel as may be deemed appropriate and render judgment thereon or may refer to a commissioner such questions as are considered proper and act upon the commissioner's report as in ordinary chancery proceedings. An appeal shall be to the Supreme Court of Appeals from any final judgment of the court rendered under this section. If the amount of compensation so determined shall be less than the sum paid to the utility under the provisions of § 56-520 the utility shall return the excess by paying the same to the State Treasurer to be credited as the Governor may direct in accordance with the provisions of § 56-518.

§ 56-523. Definitions.—The words "utilities" or "public utilities" when used in this chapter shall be construed to mean any person, partnership, association or corporation, engaged in the business of furnishing electric power, water, light, heat, gas, transportation or communication, or any one or more of them, to the people of Virginia.

"Net income" with respect to operation of a utility by the State shall be construed to mean the gross revenues derived from such operation after deducting therefrom:

(1) The costs of operation and maintenance of the utility.

(2) The amount of depreciation during the time of such operation based on the amount allowed in the utility's federal income tax return.

(3) Federal, State, and local taxes which would be payable by the utility, if the properties were operated by it.

(4) Interest on the indebtedness of the utility, and
(5) Payments for the cost of insurance.

All of such items shall be prorated on an annual basis in proportion to the time the plant is operated by the State.

§ 56-524. Penalties.—Any person violating any of the provisions of §§ 56-512, 56-515 or 56-517 shall be guilty of a misdemeanor and upon conviction of same shall be fined not less than ten nor more than one thousand dollars, and may be imprisoned in jail for not more than twelve months.

§56-525. Injunction against violation of chapter.—In addition to the remedies herein provided, the Governor is hereby authorized to apply to the circuit court of the city of Richmond or to any court mentioned in § 56-516 for, and such court shall have jurisdiction upon hearing and for cause shown to grant, a temporary or permanent injunction restraining any person, organization, association or corporation from violating any provision of this chapter irrespective of whether or not there exists an adequate remedy at law.

§ 56-526. Duty of Commonwealth's attorneys and Attorney General; employment of special counsel.—It shall be the duty of every attorney for the Commonwealth to whom the Governor shall report any violation of §§ 56-512, 56-515 or 56-517 to cause proceedings to be prosecuted without delay for the fines and penalties in such cases. The Attorney General shall be charged with the duty of enforcing all other provisions of this chapter and shall represent the Governor in all matters arising thereunder. Whenever he shall deem it in the best interest of the State the Attorney General may employ special counsel to assist him in carrying out the duties imposed by this section and the expenses so incurred shall be considered as an expense of operation of the utility and paid in accordance with the provisions of § 56-518.

§ 56-527. Chapter not applicable to certain carriers.—Nothing in this chapter shall apply to any express company, sleeping car company, common carrier engaged in interstate commerce by railroad or by air or to any company which is

directly or indirectly owned or controlled by any carrier by railroad.

§ 56-528. Governor's powers as commander in chief not impaired.—Nothing in this chapter shall be considered or construed as in any way questioning or impairing the constitutional or statutory powers of the Governor as commander in chief of the land and naval forces of the State.

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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NO. 111

H. J. HARRIS, GEORGE W. HARTMAN, OLEN B. HINER, et al.,

Appellants,

vs.

THOMAS B. STANLEY, GOVERNOR OF THE COMMONWEALTH OF VIRGINIA, ET AL.

Appeal from the Supreme Court of Appeals of The Commonwealth of Virginia

Appellants' Petition for Rehearing

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JUSTUS R. MOLL,
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Appeal from the Supreme Court of Appeals of The Commonwealth of Virginia

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Appellants' Petition for Rehearing

I. Statement

Appellants sought review by this Court of a judgment of the Supreme Court of Appeals of Virginia, holding that Appellants' suit, attacking the constitutionality of the Virginia public utilities seizure law and seeking to enjoin any further enforcement of that law, had become moot because the particular seizure which had been instituted on December 11, 1952, had been terminated.

---

[1] Upon motion made by Appellants, and granted by this Court, Thomas B. Stanley has been substituted in the place and stead of John S. Battle as a party appellee.

On October 14, 1954, this Court entered a *Per Curiam* order in this Appeal, stating:

> "It appearing that the cause has become moot, the judgment of the Supreme Court of Appeals of Virginia is vacated and the cause is remanded for such proceedings as by that Court may be deemed appropriate. United States v. Anchor Coal Co., 279 U. S. 812."

In accordance with Rule 58 of the Revised Rules of the Supreme Court of the United States, and for the reasons stated below, Appellants respectfully petition this Court to rehear and reconsider the aforesaid order.

II. Grounds Relied Upon

Appellants respectfully submit: (1) that the aforesaid order of this Court appears to be self-contradictory and its effect upon Appellants' suit is unclear; and (2) that if the aforesaid order is a judgment that the cause has become moot, such a judgment is contrary to well established principles governing the matter of mootness which have regularly been applied by this Court.

1. So far as the first point is concerned, although the order of this Court, quoted above, states that the cause appears to have become moot, it *vacates* the judgment of the Supreme Court of Appeals of Virginia and remands the cause to that Court. Yet, as previously noted, the judgment of the Supreme Court of Appeals of Virginia which is vacated by this order, was likewise that the cause had become moot. This apparent self-contradiction leaves Appellants in serious doubt as to the meaning and effect of the order of this Court. Nor do Appellants find any guidance in the *Anchor Coal* case which is cited in the Court's order. In that case the court below, from whose judgment an appeal to the Supreme Court of the United States had been taken, had issued an injunction against the appellant. Subsequent developments, occurring after the appeal was before this

Court, rendered the cause moot. In consequence, this Court dismissed the appeal on grounds of mootness; but in order that its dismissal of the appeal would not leave extant the injunction issued by the court below, this Court remanded the case to the lower court for the purpose of dissolving the injunction.

No injunction was issued by the court below in the instant case. Appellants' request for an injunction was refused on the merits by the Circuit Court of the City of Richmond and Appellants' appeal from that refusal was denied on grounds of mootness by the Supreme Court of Appeals of Virginia. The procedure adopted by this Court in the *Anchor Coal* case is therefore wholly inapposite.

2. The language of this Court's order of October 14, 1954, leaves Appellants in doubt as to what may be required of the court below as a result of the fact that that court's order denying Appellants' appeal has now been "vacated." But apart from that, Appellants fear that the confusion in that language may reflect the fact that the Appellants may not have adequately brought to the attention of this Court those special circumstances which, consistent with well-established principles of law, militate so strongly against a holding that this cause has become moot.

a) Principal among these is the fact that from the outset of this suit Appellants have made it plain that they are seeking permanent *future* relief from the effects of the Virginia seizure law involved. They believe, and have alleged, that as long as the Governor of Virginia is empowered to seize and operate the Company when a strike is threatened there is a continuous, permanent interference with the right to strike and to bargain collectively, as guaranteed by Federal law. Consistent with that contention, Appellants have from the outset sought relief not only from the particular seizure instituted in 1952, but from a continuation of the power to seize which the statute in question confers, and from any future application of that power. As long as that

is the gravamen of this suit it is difficult to see why the cause became moot solely because the 1952 seizure was lifted.

The situation is directly comparable to that which was before this Court in *United States v. Trans-Missouri Freight Association*, 166 U. S. 290. In that case the government had brought an injunction action against the defendants on the theory that the defendant Association was a combination in restraint of trade in violation of the anti-trust laws. Before the case reached the Supreme Court the Association had been dissolved, and the defendants contended that the case should therefore be dismissed as moot. This Court rejected that contention saying:

> "The prayer of the bill filed in this suit asks not only for the dissolution of the Association, but, among other things, that the defendants should be restrained from continuing in a like combination, and that they should be enjoined from further conspiring, agreeing, or combining. . . . The mere dissolution of the Association is not the most important object of the litigation. The judgment of the Court is sought upon the legality of the agreement itself for the carrying out of which the Association was formed, and if such agreement be declared to be illegal, the Court is asked not only to dissolve the Association named in the bill, but that the defendants should be enjoined for the future."

b) In substance the result this Court reached in the *Trans-Missouri* case was simply an application of one of the most firmly established principles which has guided courts on the question of mootness, i. e., the rule that the mere cessation of unlawful conduct does not make a suit to enjoin that conduct moot if it is possible for the defendant to resume the unlawful conduct. *United States v. Hamburg American Line*, 239 U. S. 466; *Federal Trade Commission v. Goodyear Tire and Rubber Co.*, 304 U. S. 257; *Walling v. Helmerich and Payne*, 323 U. S. 37; *N. L. R. B. v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261. That principle

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is clearly applicable here, for even if it could not be said that the injury sought to be remedied by Appellants' suit is a continuing injury there can be no doubt that as long as the Virginia seizure statute remains in force the defendants are free to resume—indeed they are *required* to resume—at some future date the injury to the Appellants that was inflicted by the 1952 seizure.

c) Indeed, it has often been held that one who is a potential victim of an unconstitutional or otherwise invalid statute need not wait until the injury is actually inflicted, but may bring a suit in equity to enjoin a *threatened* enforcement of the statute. *See: Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365; *Petroleum Exploration Inc. v. Public Service Commission of Kentucky*, 304 U. S. 200; *Thompson v. Smith*, 155 Va. 367. Thus Appellants could properly have instituted and maintained this suit even though no actual seizure had ever occurred, solely on the basis of the threat, inherent in the statute, that if a strike ever becomes imminent a seizure would be imposed. That being so, it seems wholly unreasonable to hold that because a seizure actually was instituted this suit became moot when the seizure was terminated before the constitutionality of the statute was determined.

d) Appellants respectfully submit that each of these sound and firmly established principles is violated by the order of this Court of October 14, 1954, if that order in fact holds that the cause has become moot. To this must be added the very cogent consideration (as outlined in Appellants' Statement as to Jurisdiction, pp. 12-13) that such a result has the practical effect of preventing a test of the constitutionality of the statute in question except in such a case as may involve a deliberate violation of the criminal sanctions of the statute or by the equally tortuous path of a case in which actual money damages can be alleged and proved. Appellants do not believe that this Court will, upon further consideration, adhere to a judgment that lacks

support in legal principle and is so inequitable in its result.

III. Conclusion

For all of the foregoing reasons Appellants respectfully request this Court to rehear and reconsider its order of October 14, 1954, to hold that this cause is not moot, and to consider and decide the federal questions raised.

Respectfully submitted,

BERNARD CUSHMAN,
Counsel for Appellants.

O. DAVID ZIMRING,
I. J. GROMFINE,
JUSTUS R. MOLL,
SEYMOUR J. SPELMAN,
Of Counsel.

Certificate

In accordance with Rule 58 of the Revised Rules of the Supreme Court of the United States I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for purposes of delay.

BERNARD CUSHMAN,
Counsel for Appellants.

No. 111. HARRIS ET AL. *v.* BATTLE, GOVERNOR, ET AL. Appeal from the Supreme Court of Appeals of Virginia. *Per Curiam:* The motion to substitute Thomas B. Stanley as a party appellee in the place and stead of John S. Battle is granted. It appearing that the cause has become moot, the judgment of the Supreme Court of Appeals of Virginia is vacated and the cause is remanded for such proceedings as by that Court may be deemed appropriate. *United States* v. *Anchor Coal Co.*, 279 U. S. 812. MR. JUSTICE REED would dismiss the appeal for lack of jurisdiction. *Norfolk Turnpike Co.* v. *Virginia*, 225 U. S. 264, 269. Since the Court, however, treats the appeal as properly before it, he votes to dismiss on the ground of mootness. THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that the case is not moot and that this Court should consider and decide the federal questions raised. *Bernard Cushman* and *Justus R. Moll* for appellants. *J. Lindsay Almond, Jr.*, Attorney General of Virginia, *C. F. Hicks*, Assistant Attorney General, and *Henry T. Wickham* for appellees. Reported below: 195 Va. lxxxviii.